No. 80-1188

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES EDGAR,

Appellant,

v.

MITE CORPORATION and MITE HOLDINGS, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX

TYRONE C. FAHNER
Attorney General of Illinois
160 North LaSalle Street
Suite 900
Chicago, Illinois 60601
(312) 793-3500
Attorney for Appellant.

PAUL J. BARGIEL
RUSSELL C. GRIMES, JR.
Assistant Attorneys General
160 North LaSalle Street, Suite 800
Chicago, Illinois 60601
(312) 793-5635
Of Counsel.

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In the

United States Court of Appeals

For the Seventh Circuit

No. 79-1267

MITE CORPORATION AND MITE HOLDINGS, INC.,

Plaintiffs-Appellees,

v.

ALAN J. DIXON,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-C-200—John Powers Crowley, *Judge.*

ARGUED NOVEMBER 9, 1979—DECIDED OCTOBER 17, 1980

Before SPRECHER and CUDAHY, *Circuit Judges,* and DUMBAULD, *Senior District Judge.**

CUDAHY, *Circuit Judge.* The possibility—and perhaps probability—that different levels of government will take quite dissimilar approaches to similar problems is inherent in federalism. But these divergences are not necessarily dysfunctional; the states in our federal system have long served as laboratories of social experiment—free, within limits, to evolve strategies of their own to meet pressing problems. State prerogatives, however, must remain necessarily circumscribed by the unifying requirements of the national authority as fixed in the Constitution. When Congress has spoken definitively (within its constitutional sphere), state legislatures may not act to obstruct or unsettle the congressional design.

* The Honorable Edward Dumbauld, Senior District Judge of the Western District of Pennsylvania, is sitting by designation.

The appeal in the instant case presents the enduring problem of defining the limits of state power within the constraints of national legislation—here involving securities regulation. Specifically, the question before us is whether the Illinois Business Take-Over Act, Ill. Rev. Stat. ch. 121½, § 137.51 *et seq.* (1979) (the "Illinois Act" or the "Act"), both facially and as applied, may stand under the supremacy and commerce clauses of the United States Constitution and the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78a *et seq.* (1976), as amended by the Williams Act.[1] The district court held the Illinois Act to be unconstitutional. We affirm.

I. FACTS

The basic facts relevant to this appeal though lengthy are undisputed. Plaintiffs-appellees MITE Corporation and MITE Holdings, Inc., are Delaware corporations with their principal executive offices in New Haven, Connecticut. MITE Holdings, Inc. is a wholly-owned subsidiary of MITE Corporation (collectively, "MITE"). Defendant-appellant Alan J. Dixon is the Secretary of State of Illinois and is charged with the administration and enforcement of the Illinois Act. Chicago Rivet & Machine Co. ("Chicago Rivet"), a defendant below but not a party to this appeal, is a publicly-held Illinois corporation with its principal executive offices in Bellwood, Illinois. Chicago Rivet has 866,264 shares of common stock outstanding and 2,181 shareholders of record. Of those shareholders, 589 are residents of Illinois, and they collectively own 377,395 common shares. Chicago Rivet's common stock is traded on the American Stock Exchange.

The scenario for the ensuing legal confrontations opens on January 19, 1979, with MITE preparing to commence a cash

[1] Pub. L. No. 90-439, 82 Stat. 454 (codified at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1976)).

tender offer[2] for all outstanding shares of Chicago Rivet common stock. Pursuant to Section 14(d)(1) of the Williams Act, 15 U.S.C. § 78n(d)(1) (1976), and Regulation 14D promulgated thereunder, MITE filed a Schedule 14D-1 with the Securities and Exchange Commission (the "SEC"). The Schedule 14D-1 indicated MITE's willingness to pay $28.00 per share for all shares of Chicago Rivet common tendered to it, a premium of more than $4.00 per share over the market price in the period immediately preceding announcement of the offer.

The same day it filed its Schedule 14D-1 with the SEC, MITE also commenced the instant action in the district court, seeking to have the Illinois Act declared null and void on its face becasue it violated the supremacy and commerce clauses of the United States Constitution. In addition, MITE sought a temporary restraining order, a preliminary injunction and a permanent injunction prohibiting Secretary of State Dixon and Chicago Rivet from enforcing the Illinois Act against it in connection with the proposed tender offer.

The scene then shifted to the courts of Pennsylvania. On January 22, 1979, Chicago Rivet filed a complaint in equity in the Court of Common Pleas of Blair County, Pennsylvania, seeking to enjoin MITE from proceeding with its proposed tender offer because MITE was purportedly in violation of the Pennsylvania Takeover Disclosure Law, 70 Pa. Cons. Stat. Ann. tit. 70, § 71 *et seq.* (Purdon Supp. 1978) (the "Pennsylvania Act"). Chicago Rivet alleged that MITE's proposed tender offer was subject to the Pennsylvania Act because Chicago Rivet had its principal place of business and substantial assets in Pennsylvania. The court granted Chicago Rivet the relief it requested, issuing an *ex parte* order enjoining MITE from proceeding with the tender offer pending a further hearing on January 26, 1979.

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[2] "A tender offer has been conventionally understood to be a publicly made invitation addressed to all shareholders of a corporation to tender their shares for sale at a specified price." Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 Harv. L. Rev. 1250, 1251 (1973).

In addition to initiating its action in Blair County on January 22, 1979, Chicago Rivet that same day also filed a complaint before the Pennsylvania Securities Commission, requesting that that Commission enforce the Pennsylvania Act against MITE. Meanwhile, back in the Northern District of Illinois, still on January 22, Chicago Rivet moved the district court in the instant action to dismiss MITE's challenge to the Illinois Act on the ground that no case or controversy existed between the parties. Chicago Rivet represented to the court that it had no present intention of invoking the Illinois Act, and Secretary of State Dixon represented that he had not decided whether MITE's offer should be exempt from the Act. Pursuant to those representations and by the consent of the parties, the district court ordered that neither Chicago Rivet nor Secretary Dixon would be allowed to initiate any action against MITE under the Illinois Act without first indicating a written intention to do so at least two business days before the proposed action was to be instituted. The district court further ordered that MITE's requests for injunctive relief were to be continued until further notice.

The following day, January 23, 1979, the action once more moved to Pennsylvania. MITE removed the action Chicago Rivet had filed in the Court of Common Pleas of Blair County to the United States District Court for the Western District of Pennsylvania, and on January 24 MITE filed its own complaint in the latter forum seeking to have the Pennsylvania Act declared unconstitutional and to have its enforcement by either Chicago Rivet or the Pennsylvania Securities Commission enjoined. Those two actions were consolidated by the federal district court in Pennsylvania.

On January 31, 1979, the Pennsylvania Securities Commission determined that it would not enforce the Pennsylvania Act against MITE's proposed tender offer, and on February 1 the District Court for the Western District of Pennsylvania denied Chicago Rivet's motion for a temporary restraining order. Apparently sensing that the tide of battle in Pennsylvania had

turned, defendants then quickly moved to proceed again under the Illinois Act. On February 1, 1979, defendant Dixon issued a temporary cease and desist order and notice of hearing regarding the proposed tender offer. Dixon concluded that MITE was about to violate the Illinois Act by commencing its offer. He notified MITE that he intended to issue an order to it to "cease and desist all further action to make a tender offer" for Chicago Rivet. This order, together with the accompanying notice, was to be served on February 5.

On February 2, 1979, Chicago Rivet notified MITE by letter that it would file suit in the Circuit Court of Cook County, Illinois, to restrain the proposed tender offer because MITE was violating the Illinois Act.

In response to defendants' decisions to invoke the Illinois Act, MITE renewed its request for relief before the district court. Judge Crowley entered an order on February 2 preliminarily enjoining defendant Dixon from issuing a cease and desist order or notice of hearing, or from otherwise enforcing the Illinois Act against MITE. MITE then published its tender offer in the national edition of the *Wall Street Journal* on February 5. The tender offer, which represented a proposed transaction in interstate commerce in excess of $23,000,000, was made to all of the shareholders of Chicago Rivet residing throughout the United States, including those residing in Illinois.

The district court entered its final judgment order in the instant action on February 9, 1979. The order declared the Illinois Act to be null and void because it was preempted by the Williams Act and because it created an undue burden on interstate commerce in violation of the commerce clause. The district court also permanently enjoined enforcement of the Illinois Act against MITE in connection with its proposed tender offer. From the judgment of the district court, defendant Dixon now appeals.

MITE withdrew its February 5, 1979 tender offer, and the record does not indicate whether MITE intends to make another tender offer for Chicago Rivet's shares. Nevertheless, if this court were to reverse the judgment of the district court, MITE would face both criminal and civil liability for making the February 5, 1979 offer in violation of the Illinois Act. *See* Illinois Rev. Stat. ch. 121½, §§ 137.63-137.65 (1979). Since the Secretary has indicated that he intends to enforce the Act against MITE, the issues before us are not moot.

II. PREEMPTION

The determination whether a challenged state statute is void under the supremacy clause is notoriously complicated. "No simple formula can capture the complexities of this determination; the conflicts which may develop between state and federal action are as varied as the fields to which congressional action may apply." *Goldstein* v. *California*, 412 U.S. 546, 561 (1973). Prior cases do not always furnish precise guidelines in resolving a particular controversy, "for each case turns on the peculiarities and special features of the federal regulatory scheme in question." *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638 (1973). Nonetheless, over the years the general tests to be applied in adjudicating questions of preemption have become reasonably well established. As the Fifth Circuit noted in *Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256, 1274 (1978), *rev'd on venue grounds sub nom. Leroy* v. *Great Western United Corp.*, 443 U.S. 173 (1979), those tests were summarized by the Supreme Court in *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525-26 (1977):

> The first inquiry is whether Congress, pursuant to its power to regulate commerce, U.S. Const., Art. 1, § 8, has prohibited state regulation of the particular aspects of commerce involved in this case. . . . [W]hen Congress has "unmistakably . . . ordained," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963), that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated

in the statute's language or implicitly contained in its structure and purpose. *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); *Rice* v. *Santa Fe Elevator Corp.*, [331 U.S. 218,] 230 [1947].[3]

Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U.S. Const., Art. VI. The criterion for determining whether state and federal laws are so inconsistent that the state law must give way if firmly established in our decisions. Our task is "to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). *Accord, De Canas* v. *Bica*, 424 U.S. 351, 363 (1976); *Perez* v. *Campbell*, 402 U.S. 637, 649 (1971); *Florida Lime & Avocado Growers, Inc.* v. *Paul, supra*, at 141; *id.*, at 165 (White, J., dissenting). This inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written. *See De Canas* v. *Bica, supra*, at 363-365; *Swift & Co.* v. *Wickham*, 230 F. Supp. 398, 408 (S.D.N.Y. 1964), *appeal dismissed*, 382 U.S. 111 (1965), *aff'd on further consideration*, 364 F.2d 241 (CA2 1966), *cert. denied*, 385 U.S. 1036 (1967).

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[3] With respect to the possibility of implicit preemption, the Fifth Circuit observed in *Great Western United Corp.* v. *Kindwell, supra*, 577 F.2d at 1274, n.38, that

> In *Rice*, the [Supreme] Court discussed some circumstances that show an implicit Congressional desire to preempt all state regulation in a given field:
>
> > The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the state to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.
>
> *Rice* v. *Santa Fe Elevator Corp.*, 1947, 331 U.S. 218, 230. *Accord, Pennsylvania* v. *Nelson*, 1956, 350 U.S. 497, 502-05.

Congress has not chosen in the Securities Exchange Act of 1934 expressly to bar the states from regulating tender offers. Indeed, the Supreme Court has noted that § 28(a) of the 1934 Act[4] "was plainly intended to protect, rather than to limit, state authority." *Leroy* v. *Great Western United Corp., supra,* 443 U.S. at 182.[5] Nor is the federal scheme of regulating tender offers so pervasive that an implicit congressional intent to preempt parallel state legislation may fairly be inferred. As discussed *infra,* the Williams Act is essentially a minimum disclosure statute. It is not analogous, for example, to the detailed and comprehensive scheme of federal regulation of aircraft noise which led to a finding of preemption in *City of Burbank* v. *Lockheed Air Terminal, Inc.,* 411 U.S. 624 (1973).[6]

Of course, even federal legislation that is not pervasive will preempt supplemental state enactments if Congress has legislated in an area of paramount federal importance. In the realms of national security and foreign affairs, state legislation has been held implicitly preempted because both areas are of

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[4] Section 28(a), as set forth in 15 U.S.C. § 78bb(a) (1976), provides in pertinent part:

> Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

[5] Section 28 was primarily designed, however, to preserve state Blue Sky laws. *Kidwell, supra,* 577 F.2d at 1275, n.39. *See* Langevoort, *State Tender-Offer Legislation: Interests, Effects, and Political Competency,* 62 Cornell L.Rev. 213, 247 (1977) (hereinafter "Langevoort").

[6] *See* Langevoort, *supra* n.5, at 248. *But see,* Wilner and Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality,* 45 Fordham L. Rev. 1, 29 (1976); Note, *Commerce Clause Limitations upon State Regulation of Tender Offers,* 47 S. Cal. L. Rev. 1133, 1163-66 (1974); Note, *The Effect of the New SEC Rules on the Constitutionality of State Takeover Statutes,* 8 Fordham Urb. L. J. 913, 930-31 (1979-80) (suggesting that the Williams Act constitutes a pervasive scheme of federal regulation if considered together with the new SEC tender offer rules, discussed *infra*).

unquestionably vital significance to the nation as a whole. *See Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956) (national security); *Hines* v. *Davidowitz*, 312 U.S. 52 (1941) (foreign affairs). But federal securities regulation is not of equivalent paramountcy, as an area of federal concern, to the security of the nation or to the conduct of its international relations. On the contrary, the absence of an exclusive federal interest in the field of securities regulation is persuasively demonstrated by the historically coordinate role of state regulation in the field.[7]

Thus, in the absence of explicit or implicit preemption, our task is to determine whether the Illinois Act conflicts with the Williams Act, to ascertain "whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 526 (1977). *Accord, De Canas* v. *Bica*, 424 U.S. 351, 363 (1976); *Perez* v. *Campbell*, 402 U.S. 637, 649 (1971); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 141; *id.*, at 165 (White, J., dissenting). A careful comparison of the terms of the Williams Act with the Illinois Act is accordingly requisite. *Cf. Perez* v. *Campbell*, 402 U.S. 637, 644 (1971).

The Williams Act is a product of the economic boom of the 1960's. During that period of business growth and corporate acquisition by conglomerates and others, the cash tender offer first came into vogue as a favored method for corporate takeovers. *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 22 (1977). Passage of the Williams Act was designed to close the gap in the disclosure requirements of the federal securities laws by bringing cash tender offers, which theretofore stood virtually unregulated, within the ambit of federal securities regulation. *Id.*[8]

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[7] "Congress, in the securities field, has not adopted a regulation system wholly apart from and exclusive of state regulation." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117, 137 (1973).

[8] *See generally* S. Rep. No. 550, 90th Cong., 1st Sess. 2-4 (1967); H.R. Rep. No. 1711, 90th Cong., 2d Sess., 2-4 (1968).

The dominant theme of the Williams Act is the protection of investors. *Piper* v. *Chris-Craft Industries, Inc., supra* at 29. As the Supreme Court remarked in *Piper:*

> In introducing the [Williams Act] on the Senate floor, the sponsor, Senator Williams, stated:
>
> > "This legislation will close a significant gap in *investor protection* under the Federal securities laws by requiring the disclosure of pertinent information *to stockholders* when persons seek to obtain control of a corporation by a cash tender offer or through open market or privately negotiated purchases of securities." 113 Cong. Rec. 854 (1967) (emphasis supplied [by the Supreme Court].)

430 U.S. at 26.

Investors are protected under the Williams Act through what has been termed a "market approach." "The function of federal regulation is to get information to the investor by allowing both the offeror and the incumbent managers of a target company to present fully their arguments and then *to let the investor decide for himself." Kidwell, supra,* 577 F.2d at 1276 (emphasis supplied).

The principal disclosure provisions of the Williams Act are sections 13(d) and 14(d). 15 U.S.C. §§ 78m(d), 78n(d) (1976). Section 13(d) requires that a purchaser of any equity security registered pursuant to Section 12 of the 1934 Act file a Schedule 13D[9] with the SEC within 10 days after its purchases have exceeded 5% of the outstanding shares of the security. The Schedule 13D mandates disclosure, *inter alia,* of the background and identity of the purchaser, the source and amount of funds for the purchase, the number of shares owned and of any plans to materially alter the target corporation's business or corporate structure (if the intent of the purchases is to obtain control). Section 14(d), more immediately relevant to the instant case, is designed to insure informed shareholder decisionmaking in the face of a tender offer by requiring that a tender offeror file a Schedule 14D-1[10] with the SEC and furnish

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[9] 17 C.F.R. § 240.13d-101 (1979).

[10] 17 C.F.R. § 240.14d-100 (1979).

to the target's shareholders all material information which it contains. The disclosures required in a Schedule 14D-1 are essentially similar to those required by a Schedule 13D.

The Williams Act also contains a number of substantive protections for stockholders who elect to tender their shares. First, tendering shareholders are given the right to withdraw their tender of stock within the first seven days of an offer and, if the offeror has not yet purchased their shares, at any time after 60 days from the date the offer commenced. 15 U.S.C. § 78n(d)(5) (1976).[11] Second, if the total number of shares tendered exceeds the number sought, those shares tendered during the first ten days of the offer must be taken up pro rata by the offeror. 15 U.S.C. § 78n(d)(6) (1976). Finally, if the initially offered consideration is later increased during the course of the offer, all tendering shareholders must receive the higher price. 15 U.S.C. § 78n(d)(7) (1976).

Turning to the Illinois Act, even the most cursory perusal reveals that it contains a number of provisions which are not to be found in the Williams Act. From the fact that the two statutes differ, MITE suggests at least by implication that a preemptive conflict must necessarily exist. That argument is simplistic; mere differences between state and federal regulation of the same subject are not conclusive of preemption. No one disputes that the two statutes differ. But the crucial inquiry is whether the Illinois Act differs from the Williams Act in such a way that achievement of the congressional objective of investor protection is frustrated. *Hines* v. *Davidowitz, supra.*

In this regard the most troublesome portion of the Illinois Act is a provision contained in the hearings section of the Act, § 137.57.E, which provides:

> If the Secretary [of State] finds that the take-over offer fails to provide full and fair disclosure to the offerees of all material information concerning the take-over offer, *or that the take-over offer is inequitable* or would work or tend to work a fraud or deceit upon the offerees, or that the

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[11] The initial seven day withdrawal period contained in the Williams Act was recently extended to fifteen business days by the SEC. 17 C.F.R. § 240.14d-7 (1979).

take-over offer will not be made to all offerees in this State on substantially equal terms, or that the take-over offer would violate this Act, the Secretary shall by order deny the registration of the take-over offer[12] or condition its registration upon certain changes or modifications. If the Secretary finds that the take-over offer provides full and fair disclosure to the offerees of all material information concerning the take-over offer, and that the take-over offer is made to all offerees in this state on substantially equal terms *and the Secretary does not find that the offer is inequitable* or would work or tend to work a fraud or deceit upon offerees in this State, or would violate this Act, the Secretary shall by order register the take-over offer. Registration of the take-over offer does not constitute approval of the offer by the Secretary (emphasis supplied).

Ill. Rev. Stat. ch. 121½ § 137.57.E (1979).

The Illinois Act thus empowers the Secretary of State to pass upon the substantive fairness of a tender offer and to prohibit it from going forward, if, in his sole opinion, he judges the offer "inequitable." Dixon defends this provision on the ground that "allowing for review by a neutral state administrator while the securityholders have time to consider the offer" will not result in unnecessary delay. Appellant's Brief at 17. This defense, however, is inadequate because it responds to the wrong challenge. Illinois' substitution of the judgment of its Secretary of State for an investor's own assessment of the equitability of a tender offer is patently inconsistent with the Williams Act, but not primarily because the state statutory process may unduly slow the progress of tender offers. Rather, this approach to investor protection by "benevolent bureaucracy" is preempted by the conflicting approach of the Williams Act, which contemplates unfettered choice by well-informed investors. Both the House and Senate Reports observed that "[t]his bill is designed to make the relevant facts known so that shareholders have a fair opportunity to make *their* decision." H.R. Rep. No. 1711, 90th Cong., 2d Sess. 3 (1968); S. Rep.

[12] Any person publishing an unregistered take-over offer is subject to criminal prosecution. Ill. Rev. Stat. ch. 121½, §§ 137.54, 137.63 (1979).

No. 550, 90th Cong., 1st Sess. 3 (1967); [1968] U.S. CODE CONG. & AD. NEWS at 2813 (emphasis supplied).[13]

The state thus offers investor protection at the expense of investor autonomy—an approach quite in conflict with that adopted by Congress. Congress contemplated only that investors be protected from acting in ignorance, not from their own well-informed choice. Thus, to the extent that Illinois has chosen to rely upon its Secretary of State's judgment rather than upon investors' own judgment after full disclosure of the relevant facts, its regulatory scheme stands in fundamental conflict with federal law and is therefore unconstitutional. *Cf. Kidwell, supra* at 1279.[14]

Because it potentially affords the target company's management a powerful weapon to stymie indefinitely a takeover,

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[13] Federal disclosure legislation employing "market" approach does not necessarily preempt other state statutes incorporating regulatory approach, e.g. Blue Sky laws. See note 5 *supra;* Langvoort, *supra* note 5 at 247. In this connection, our finding that the Illinois Act is preempted by the Williams Act finds support, *inter alia,* in the enactment of the Williams Act prior to the Illinois Act and in the extraterritorial impact of the Illinois Act. See part III *infra.*

[14] When the Williams Act was under consideration, even the SEC did not suggest that it be granted the authority to weigh the substantive fairness of a tender offer. As then SEC Chairman Cohen stated:

> We do not wish to imply . . . that the Commission should have power or responsibility to pass on the merits of a particular acquisition or proposal. As in most other areas entrusted to it, the Commission's responsibility should be limited to requiring appropriate disclosures.

Hearings on S.510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 33 (1967).

See also Securities and Exchange Commission, *The Work of the Securities and Exchange Commission* 2 (1974); Note, *The Indiana Business Takeover Act,* 51 Ind. L. J. 1051, 1096-97 (1976).

another provision of the Illinois Act relating to hearings is also unacceptable.[15] This provision forms an additional obstacle to the congressionally-mandated purpose that shareholders be free within a reasonable time[16] to accept a tender offer they deem fair (after full disclosure). Thus, Section 137.57.A provides:

> The Secretary shall call a hearing if the Secretary deems necessary for the protection of offerees in this State or if within 15 business days after the date of filing the registration statement a written request for a hearing is submitted to the Secretary, by a majority of the directors of the target company who are not officers or employees of the target company or by a person or persons who are located in this State as determined by post office address as shown on the records of the target company and who hold of record or beneficially, or both, at least 10% of the outstanding shares of any class of equity securities which is the subject of the take-over offer.

Ill. Rev. Stat. ch. 121½, § 137.57.A (1979).

Although Illinois apparently did not *intend* to accord incumbent management the right to require the holding of hearings, the effort to disarm management is not realistically assured of success. It still seems likely that in a significant number of cases management will be able to use the provision, either through its ability to influence outside directors, or because it will, directly or indirectly, exercise some (or a great deal of) control over the required number of outstanding shares. Since the interests of the target company's management at the time of a tender offer are likely to be adverse to those of the offeror (and conceivably the shareholders),[17] anything which suggests delegation to management of the right to call

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[15] For a discussion of the objectives of maintaining a balance between the target company's management and the offeror in the context of investor protection, *see infra*.

[16] The Act does not fix any time within which hearings must be completed. Presumably they might be extended indefinitely. Ill. Rev. Stat. ch. 121½, § 137.57 (1979).

[17] *See* Note, *Securities Law and the Constitution: State Tender Offer Statutes Reconsidered*, 88 Yale L. J. 510, 531 (1979) (hereinafter "*Tender Offer Statutes Reconsidered*").

hearings (of potentially indefinite duration) does not further the congressional goal of insuring freedom of action of informed stockholders. It may be acceptable in some way, and with appropriate justification, to require hearings on the request of persons other than a public official. But in general, any delegation of the right to call hearings to private parties potentially (but realistically) subject to management influence or direction must be regarded as suspect.[18]

The hearing provision, together with the Act's 20-day pre-effective filing requirement,[19] are also subject to more general attack on the ground that they may result in unacceptable delay (which, in the case of hearings, might be interminable). This delay will allegedly enhance incumbent management's ability to defeat a tender offer, to the detriment of investors. Two schools of thought have emerged with respect to the relationship among state takeover statutes as engines of delay, the possible inhibition or withdrawal of tender offers (primarily as a result of delay), and preemption under the Williams Act. On the one hand, most courts, including the Fifth Circuit in *Kidwell*, have reasoned along the following lines: the Williams Act was designed both to protect shareholders and to preserve a neutral balance between incumbent management and offeror. Because state takeover statutes hinder the successful completion of tender offers by providing management with a powerful weapon of delay, such statutes "[disrupt] the neutrality indispensable for the proper operation of the federal market

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[18] We are, of course, addressing here only requests which would mandatorily trigger hearings. Mere precatory requests are quite distinguishable and, in and of themselves, acceptable.

[19] Illinois Act § 137.54, which provides in pertinent part:

> E. A take-over offer shall become registered [and thereby effective] 20 business days after the date of filing the registration statement or an amendment thereto with the Secretary, unless accelerated by order or delayed by written notification, or unless prior thereto the Secretary calls a hearing with respect to the offer.

Ill. Rev. Stat. ch. 121½, § 137.54.E (1979).

approach," and therefore "[stand] as . . . obstacle[s] to the accomplishment and execution of the full purposes and objectives' of the Williams Act." *Kidwell, supra* at 1279-80.[20]

On the other hand, at least one court, and several commentators, have taken issue with the Fifth Circuit's approach.[21] They argue, citing the Supreme Court, that "the sole purpose of the Williams Act was the protection of investors. . . ." *Piper* v. *Chris-Craft, supra* at 35. Hence they reject the further contention that Congress sought to legislate affirmative regulatory neutrality between the combatants in a tender offer situation. In this conclusion, they rely, *inter alia,* on an observation of the Supreme Court in *Piper,* that "Congress was indeed committed to a policy of neutrality in contests for control, but its purpose of evenhandedness does not go . . . to the purpose of the legislation. . . . Neutrality is, rather, but one characteristic of legislation directed toward a different purpose—the protection of investors." 430 U.S. at 29. One commentator has summarized this position as follows:

> Any balance that emerged from the Williams Act was neither a "purpose" nor an "objective" of its draftsmen, but rather a byproduct of the congressional desire to "require full and fair disclosure for the benefit of investors." The fact that the state statutes may alter this balance is therefore an inappropriate basis for statutory preemption. Only if state regulation of tender offers

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[20] *Accord, Telco Marketing Services, Inc. v. Hospital Finance Corp.,* No. 79-C-2343 (N.D. Ill. June 11, 1979); *Brascan Ltd.* v. *Lassiter,* No. 79-1253 (E.D. La. May 3, 1979); *Dart Industries Inc. v. Conrad,* 462 F. Supp. 1 (S.D. Ind. 1978); *Daylin v. Uarco,* No. 78-C-4246 (N.D. Ill. Nov. 27, 1978). *See also,* Note, *The Indiana Business Takeover Act, supra* n.13, at 1092.

[21] *See AMCA International Corp.* v. *Krouse,* 482 F. Supp. 929 (S.D. Ohio 1979); *cf Telvest, Inc.* v. *Bradshaw,* 618 F.2d 1029 (4th Cir. 1980). *See also* Note, *Preemption and the Constitutionality of State Tender Offer Legislation,* 54 Notre Dame Law. 725, 734-35 (1979); Note, *The Constitutionality of State Takeover Statutes: A Response to Great Western,* 53 N.Y.U.L. Rev. 872, 914-15 (1978) (hereinafter "*A Response to Great Western*").

> conflicts with the true purpose and objective of the Williams Act—investor protection—should the state laws be held to be preempted (footnotes omitted).

Tender Offer Statutes Reconsidered, supra n.16, at 522-23.

But the inadequacy in this point of view seems to lie in its implicit assumption that the "goals" of investor protection and evenhanded regulation are necessarily distinct and, to a significant degree, unrelated. It does not seem to us that they are. Rather, inhibitions on tipping the regulatory balance, particularly on tilting toward incumbent management, are important because maintenance of an equitable balance between the contending sides is perceived as a principal means of investor protection. For if the weapons in management's arsenal are drastically augmented, the vigor of the tender offer device will at some point be impaired, denying protection to stockholders in an obvious dimension: the right to tender their shares at a premium. Thus, in its concern for investors, Congress was necessarily committed to maintaining, where appropriate, the basic capability of offerors to make successful tender offers (as well as, of course, maintaining the free flow of information to stockholders both from offerors and from management).[22]

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[22] The legislative history of the Williams Act is replete with references to the necessity of avoiding undue interference with tender offers (so as not to injure investors). The following interchange between Senators Javits and Williams on the Senate floor is particularly revealing.

> Mr. JAVITS. One other question I should like to ask the Senator: There is no intendment in the measure, or in the fact that the measure is offered, to in any way condemn the practice of making tenders, is there? Sometimes stockholders do very well because of tenders, especially competitive tenders.
>
> Mr. WILLIAMS of New Jersey. There is no intention in any way to prohibit tender offers. As a matter of fact, I think it might encourage them. Through this legislation people will have more information, and will be able to intelligently decide whether to accept a tender offer and sell their shares to a group which may wish to obtain a controlling interest.

113 Cong. Rec. 24665 (1967). Senator Javits also later remarked in the same discussion:

(Footnote continued on following page)

Turning again to the Illinois Act, any conclusion as to the actual effect it has had, or may have, on tender offers in Illinois would be purely speculative because the record is devoid of evidence on that subject. It is obvious from the face of the statute, however, that tender offers subject to the Act may proceed at a much slower pace than if they were regulated exclusively under the Williams Act. As indicated, the Illinois Act provides that a tender offer does not become effective until 20 business days after the offeror has filed a registration

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(Footnote continued from preceding page)

> I gather that the point of the Senator from New Jersey [Senator Williams] and the Senator from California [Senator Kuchel] is that this is at least a beginning in keeping up with getting adequate representation and adequate information on the part of the stockholder, who could conceivably be imposed upon, *without denying him the opportunities which result from the competitive bidding for a block of stock of a given company.*
>
> 113 Cong. Rec. 24665-66 (1967) (emphasis supplied).

In a similar vein, Senator Williams observed on an earlier occasion that

> This measure is not aimed at obstructing legitimate takeover bids. In some instances, a change in management will prove a welcome boon for shareholder and employee, and in a few severe situations it may be necessary if the company is to survive.
>
> I have taken extreme care with this legislation to balance the scales equally to protect the legitimate interests of the corporation, management, and shareholders without unduly impeding cash takeover bids. Every effort has been made to avoid tipping the balance of regulatory burden in favor of management or in favor of the offeror. The purpose of this bill is to require full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management equal opportunity to fairly present their case. . . .
>
> With this in mind, I am certain that this amendment to the Securities Exchange Act will benefit the interests of America's more than 20 million shareholders and will not serve as a device to protect an inefficient management from a legitimate takeover bid.
>
> 113 Cong. Rec. 854-55 (1967).

statement concerning the offer with the Secretary of State. *See* n.18, *supra*. By contrast, the Williams Act contains no such prenotification requirement. Indeed, Congress has repeatedly rejected a series of prenotification proposals.[23]

The Illinois Act also prevents a tender offer from going forward until after completion of a hearing, in the likely event that one is requested. *See* p. 17, *supra*. A request for a hearing need not be made until 15 business days after the offeror's registration statement has been filed, need not commence until 10 business days after the hearing request was received, and may last indefinitely. Ill. Rev. Stat. ch. 121½, § 137.57 (1979). Once the hearing has been concluded, the Secretary of State is accorded an additional 15 business days to make a decision, which he may extend. *Id.* By contrast, no hearings are contemplated or required under the Williams Act.

Extended delay potentially threatens the viability of the tender offer device in two related ways. First, if time is of the essence, delay increases the possibility that an offer, once made,

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[23] In 1965, Congress rejected a proposed twenty-day prenotification requirement. *See* 111 Cong. Rec. 28257-28259 (1965). In 1967, Congress rejected a five-day prenotification requirement. S. Rep. No. 550, 90th Cong., 1st Sess. 4 (1967); *Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 72-75, 87-89, 98, 105, 139-40, 151, 163, 245 (1967); *Hearings on H.R. 14475 and S. 510 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 2d Sess. 44-46, 50-54 (1968). In 1970, Congress rejected yet another prenotification proposal. *See Hearings on H.R. 4285, S. 3431 and S. 336 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 6-7 (1970).

A prenotification requirement is less defensible than required delays *after* a tender offer has been made, because implementation of a successful defensive strategy by management before an offer becomes effective, *e.g.*, the arrangement of a defensive merger, might entirely deprive stockholders of the chance to sell their shares at a premium. *See infra*. *See also Tender Offer Statutes Reconsidered, supra* n.16, at 531-32. Moreover, a number of commentators have identified prenotification provisions as particularly detrimental to successful takeovers. *See, e.g.*, Langevoort, *supra* n.5, at 226-29.

will not be successfully completed. This is because delay eliminates the element of surprise, and affords incumbent management, whose jobs are likely to be imperiled, an opportunity to resort to a variety of defensive maneuvers to thwart the attempted takeover.[24] Second, the specter of delay may serve to dissuade potential offerors from initiating offers at all. *See Kidwell, supra* at 1278 (and sources cited therein).

Both of these propositions regarding delay have been the subject of lively debate in the literature. Delay has been said to benefit rather than injure investors, primarily by permitting the emergence of competitive suitors (and arbitrageurs), thereby creating an "auction market" in which the target's stockholders will ultimately receive a higher premium for their shares. *Tender Offer Statutes Reconsidered, supra* n.20, at 524. *See also A Response to Great Western, supra* n.20, at 901-02, 913. Arguably, stockholders may also benefit from the opportunity to weigh for an extended period an offer as to which there might otherwise be a requirement to promptly tender their shares. *Tender Offer Statutes Reconsidered, supra* n.16, at 524. Moreover, as an empirical matter, despite the proliferation of state takeover statutes, there is no clear indication that those endeavoring to obtain corporate control have curtailed their use of the tender offer mechanism. *See AMCA International Corp.* v. *Krouse,* 482 F. Supp. 929 (S.D. Ohio 1979); *Tender Offer Statutes Reconsidered, supra* n.16, at 523; *A Response to Great Western, supra* n.20, at 902-03, 913.

As indicated, however, there is no evidence in the record about what the actual effect of the potential for delay, inherent in the Illinois Act, has been. In the absence of such evidence, we ought not to second-guess Congress' judgment that delay

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[24] Frequently employed defensive tactics include, *e.g.*, arranging a defensive merger, exhorting shareholders not to tender their shares, increasing dividends and abolishing cumulative voting. *See generally,* Schmults & Kelly, *Cash Take-over Bids—Defensive Tactics,* 23 Bus. Law. 115 (1967); Note, *Defensive Tactics Employed by Incumbent Managements in Contesting Tender Offers,* 21 Stan. L. Rev. 1104 (1969).

grossly in excess of that contemplated by the Williams Act redounds to the detriment of stockholders by substantially deterring the making of tender offers. As the Fifth Circuit noted in *Kidwell*, that assessment was reaffirmed by Congress during consideration of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (1976).

The House Report stated

> it is clear that this short waiting period [referring to the 10 days required by the Williams Act] was founded on congressional concern that a longer delay might unduly favor the target firm's management and permit them to frustrate many pro-competitive cash tenders. This 10-day waiting period, thus underscored the basic purpose of the Williams Act—to maintain a neutral policy toward cash tender offers, by avoiding lengthy delay that might discourage their chances for success.

H.R. Rep. No. 94-1373, 94th Cong., 2d Sess. 12 (1976); U.S. CODE CONG. & ADMIN. NEWS 1976, pp. 2572, 2644. Congressman Rodino explained to the House:

> Lengthy delays will give the target firm plenty of time to defeat the offer, by abolishing cumulative voting, arranging a speedy defensive merger, quickly incorporating in a State with an antitakeover statute, or negotiating costly lifetime employment contracts for incumbent management. And the longer the waiting period, the more the target's stock may be bid up in the market, making the offer more costly—and less successful. Should this happen, it will mean that shareholders of the target firm will be effectively deprived of the choice that cash tender offers give to them.... *Generally, the courts have construed the Williams Act so as to maintain these two options for the target company's shareholders, and the House conferees contemplate that the courts will continue to do so.*

122 Cong. Rec. 30877 (1976) (emphasis added [by the Fifth Circuit]).

Kidwell, Supra at 1277-78.

We therefore conclude, purely in light of the congressional judgment and analysis, that tender offers may not be unduly hindered (by grossly extended delay under state law) to the detriment of investors. We reiterate that we possess no independent insight, based on evidence or research, about what the effect of slight or interminable delay may be. But we think the perspectives informing congressional legislation are reasonably clear and are binding upon us. Therefore, we conclude that the Illinois Act is preempted by the Williams Act because the former (1) tends inordinately to substitute regulatory control for investor autonomy, (2) provides for hearings the institution of which may be indirectly delegated to incumbent management and which are potentially interminable in length, (3) provides for other delays and mechanisms for delay which are potentially grossly in excess of the delay mandated by Congress and deemed by Congress to be appropriate to the protection of investors and (4) provides for lenghtly pre-notification delay, a requirement Congress specifically rejected.[25]

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[25] The Illinois Act also differs from the Williams Act in certain other particulars. The Illinois Act requires somewhat more extensive disclosure by an offeror than does the Williams Act, and the Illinois Act requires that acceptances of a partial offer be pro rated for the entire period of the offer, whereas the Williams Act requires proration only of those acceptances made during an offer's initial ten days, although that ten day period may be extended by the offeror. *Cf.* Ill. Rev. Stat. ch. 121½, §§ 137.54 and 137.59.D (1976) with 15 U.S.C. § 78n(d) (1976) and 17 C.F.R. § 240.14d-8 (1979). (The Illinois Act also grants to stockholders a longer period to withdraw their tenders than originally provided for in the Williams Act (17 calendar days v. 7 days), *cf.* Ill. Rev. Stat. ch. 121½, § 137.59.C (1979) with 15 U.S.C. § 78n(d)(5) (1976), but this requirement does not differ markedly from the 15 business day requirement contained in the new SEC tender offer rules, 17 C.F.R. § 240.14d-7 (1979), discussed below. Similarly, the Illinois Act's 20 calendar day minimum offering period, Ill. Rev. Stat. ch. 121½, § 137.59.B (1979), is almost identical to the 20 business day period prescribed by the SEC. 17 C.F.R. § 240.14e-1 (1979)). Aside from the extent to which these differing

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requirements of the Illinois Act may exhibit the constitutional infirmities discussed *supra*, we express no opinion as to whether the Williams Act preempts them.

We also take note that, on December 6, 1979, the SEC promulgated new rules governing tender offers. 17 C.F.R. § 240-14d-1 *et seq.* (1979). Those rules, most glaringly Rule 14d-2(b), directly conflict with the Illinois Act. As the SEC observed:

> Under Rule 14d-2(b) a bidder's public announcement through a press release, newspaper advertisement or public statement of certain material terms of a cash tender offer causes the bidder's tender offer to commence under Section 14(d) of the [1934] Act....
>
> Some commentators noted that there is a direct conflict between Rule 14d-2(b) and state anti-takover statutes with the effect that such statutes are preempted. These statutes typically require a publication of or a public filing which includes the material terms of the tender offer prior to the time the offer may be commenced [The Illinois Act requires a public filing at least 20 days prior to the time an offer may begin. *See* n.17, *supra.*] These requirements of the state statutes will trigger the commencement of the tender offer under Rule 14d-2(b) despite the fact that the state statutes do not permit the offer to commence until the conclusion of any applicable waiting period and hearing process. Moreover, by deeming commencement to occur on the date of the publication or filing required by these statutes, the minimum periods, best price, and withdrawal and pro rata rights provided under these statutes could not function since they are usually predicated on the effective date of the tender offer which cannot occur until after the conclusion of the waiting period and hearing process.
>
> Thus, the conflict between Rule 14d-2(b) and such state statutes is so direct and substantial as to make it impossible to comply with both sets of requirements as they presently exist. While recognizing its long and beneficial partnership with the states in the regulation of securities transactions, the Commission nevertheless believes that the state takeover statutes presently in effect frustrate the operation and purposes of the Williams Act and that, based upon the abuses in current tender offer practice discussed above, Rule 14d-2(b) is necessary for the protection of investors and to achieve the purposes of the Williams Act (footnotes omitted).

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III. THE COMMERCE CLAUSE

The commerce clause provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States. . . ." U.S. Const., Art. I, § 8, cl. 3. "Although the Clause thus speaks in terms of powers bestowed upon Congress, the [Supreme] Court long has recognized that it also limits the power of the States to erect barriers against interstate trade." *Lewis* v. *BT Investment Managers, Inc.*, 100 S. Ct. 2009, 2015 (1980). It remains true, however,

> that much state legislation, designed to serve legitimate state interests and applied without discrimination against interstate commerce, does not violate the Commerce Clause even though it affects commerce. . . . "[I]n areas where activities of legitimate local concern overlap with the national interests expressed by the Commerce Clause—where local and national powers are concurrent—the Court in the absence of congressional guidance is called upon to make 'delicate adjustment of the conflicting state and federal claims,' *H.P. Hood & Sons, Inc.* v. *Du Mond*, [336 U.S. 525, 553 (1949)] (Black, J., dissenting). . . ." *Great A & P Tea Co.* v. *Cottrell*, [424 U.S. 366, 371 (1976)]; see *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U.S. 333, 350 (1977).[26]

Raymond Motor Transportation, Inc. v. *Rice*, 434 U.S. 429, 440 (1978).

(Footnote continued from preceding page)

44 Fed. Reg. 70329-30 (1979).

Our finding of preemption in the instant case, however, does not rely on the new SEC rules, because those rules do not apply to tender offers made prior to their effective date, as is the case with the tender offer here. 44 Fed. Reg. 70326 (1979), *Cf. AMCA International Corp.* v. *Krouse*, 482 F. Supp. 929, 933-34, n.4 (S.D. Ohio 1979).

[26] Congress may, if it chooses, affirmatively authorize state regulation that would otherwise contravene the commerce clause. *See, e.g., Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945). In the instant case, defendant Dixon has not argued that Congress has consented to state takeover statutes without regard to their impact upon interstate commerce. *Cf. Kidwell, supra* at 1281-82.

The test to be applied in making the "delicate adjustment" of state and federal claims is set forth in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Accord, Lewis v. *BT Investment Managers, Inc., supra* at 2015-16; *Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979); *Raymond Motor Transportation, Inc.* v. *Rice, supra* at 441-42; *Great A & P Tea Co.* v. *Cottrell*, 424 U.S. 366, 371-72 (1976); *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 443 (1960). Also relevant is the Supreme Court's statement in *Hughes* v. *Oklahoma, supra* at 336, that "when considering the purpose of a challenged statute, this Court is not bound by '[t]he name, description or characterization given it by the legislature or the courts of the State,' but will determine for itself the practical impact of the law. *Lacoste* v. *Louisiana Dept. of Conservation*, 263 U.S. 545, 550 (1924). . . ."

Dixon maintains that the state sought to further two legitimate local interests through enactment of the Illinois Act. First, Illinois assertedly acted to protect resident security holders, primarily by insuring that they possess adequate time and information to review the merits of a tender offer before deciding whether to tender their shares. Protecting resident investors is indisputably a legitimate state objective. Yet, as set forth above, the Williams Act itself protects investors by requiring disclosure, withdrawal rights, pro rata purchases and equal consideration for all shares taken up. Therefore, the benefit of the Illinois Act is limited to the marginal increase in

information, time and other benefits that Illinois shareholders may gain as a result of the Act's operation. But, as we noted in the context of preemption, the potentially prolonged delay required by the Act may, in some circumstances at least, be detrimental to the interests of the shareholders. It has also been argued (with respect to a state's interest in its own investors) that additional disclosures, rather than allowing shareholders to make a more informed decision, may actually serve to confuse them and to obscure relevant information. *See Kidwell, supra* at 1280-81 (and sources cited therein). Thus, the benefits flowing to Illinois shareholders from the Act are, to a significant degree, speculative.

And, of course, the strength of the state's interest varies with the number of shareholders that are Illinois residents. In this case, some 27% of Chicago Rivet's shareholders, holding approximately 43% of Rivet's outstanding shares, were Illinois residents. It is fortuitous that this relatively substantial number lived in Illinois. The Act would have applied even if none of Rivet's shareholders were Illinois residents and all the stock sales had occurred elsewhere, since the Act reaches every tender offer made for any corporation that meets, *inter alia*, two of the following conditions:

> (a) has its principal executive office in [Illinois];
>
> (b) is organized under the laws of [Illinois];
>
> (c) has at least 10% of its stated capital and paid-in surplus represented in [Illinois].

Ill. Rev. Stat. ch. 121½, § 137.52-10 (1979). Thus, the Act grants jurisdiction to the Secretary of State over tender offers that would not affect a single Illinois shareholder.[27]

The second interest Dixon asserts on the state's behalf is an interest in regulating the internal affairs of a corporation incorporated under Illinois law. A tender offer is argued to be

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[27] The Act also applies to tender offers made for corporations for which 10% of the outstanding shares are held by Illinois residents. Ill. Rev. Stat. ch. 121½, § 137.52-10 (1979).

functionally equivalent to a variety of other methods designed to effect changes in corporate control, *e.g.*, proxy contests and mergers, which have traditionally been subject to regulation by the state of incorporation. *See* Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Case W. Res. L. Rev. 722, 741-45 (1970); *A Response to Great Western, supra* n.19, at 931-34.

The contention that sales of securities made pursuant to a tender offer are properly analyzed (as "internal affairs") in terms of their cumulative potential to shift control of a corporation, rather than simply as sales of stock from one investor to another, is another proposition which has been extensively debated in the literature.[28] But assuming *arguendo* that a state has an interest in regulating transfers of control of locally incorporated corporations, defendant has not set forth any specific interest that Illinois has in asserting regulatory authority over the tender offer *in this case*. There is no reason to believe that Illinois' interest in regulating shifts in control, as affected here, is especially weighty. The state has not argued, for example, that MITE was intent on looting Chicago Rivet to the

[28] *Cf., e.g.*, Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Case W. Res. L. Rev. 722, 741-45 (1970); *A Response to Great Western, supra* n.19, at 931-34 (both arguing that a tender offer is an internal corporate transaction) with Wilner and Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 Fordham L. Rev. 1, 16-17 and Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 S. Cal. L. Rev. 1133, 1153-55 (1974) (suggesting that a tender offer is merely the aggregate of numerous individual sales of securities). The Fifth Circuit has concluded that a tender offer is not properly classifiable under the internal affairs doctrine. *Kidwell, supra* at 1280, n.53.

detriment of state interests.[29] We also note that, although the instant tender offer was made for an Illinois corporation, the Illinois Act applies, *inter alia*, to tender offers for any corporation of which 10% of the outstanding class of equity securities is held by Illinois residents. Ill. Rev. Stat. ch. 121½, § 137.52-10 (1979). Thus, the Act applies to corporations that are incorporated in another state and have their principal place of business outside of Illinois. Illinois clearly has no interest in regulating the internal affairs of such corporations.

Having generally identified the weight and nature of Illinois' regulatory concerns, we must now examine the burden imposed by the Illinois Act on interstate commerce. The impact of the Act on the sale of securities in interstate commerce is in many respects at least potentially weighty. The Act's most obvious burdens result from its global impact. Once the Act has been invoked, all purchases, or offers to purchase by the offeror, of the target company's stock pursuant to a tender offer may be halted, including transactions to be executed entirely outside the boundaries of Illinois. The Illinois Act thus possesses a significant potential to cause commercial disruption.[30] For example, had the Secretary of State not been

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[29] Since Chicago Rivet is an Illinois corporation, the instant case does not directly raise the question whether a state not the state of incorporation has a valid interest in transfers of control (through tender offers for stock). The Illinois Act, for example, seems to be based on the assumption that the state has a recognizable interest in transfers of control if substantial assets and/or the corporation's principal place of business is located in Illinois. *See generally* Shipman, *Some Thoughts About the Role of State Takeover Legislation: The Ohio Takeover Act*, 21 Case W. Res. L. Rev. 722, 751-55 (1970); *A Response to Great Western*, *supra* n.20 at 934-39.

As a practical matter, the state wherein employees or operations are located may have a greater interest in transfer of control (presumably under the "internal affairs" doctrine) than the state of incorporation (if these states are not the same). These possibly disparate bases for local regulation of control transfers do, however, threaten to impair the certainty and uniformity of regulation.

[30] *See, e.g.*, Wilner and Landy, *The Tender Trap: State Takeover Statutes and Their Constitutionality*, 45 Fordham L. Rev. 1, 19-21 (1976).

enjoined from going forward in the instant case, over 23 million dollars of interstate commerce would presumably have been affected. Illinois law would have determined when, if ever, purchases of, or offers to purchase, securities would be permitted under a tender offer. Moreover, the disruptive effects of the Illinois Act could be duplicated by other states seeking simultaneously to assert jurisdiction over a tender offer. In the case at bar, Chicago Rivet argued at various times that both the Illinois and Pennsylvania Acts applied to MITE's proposed tender offer. Where a number of states on various bases claim authority over a tender offer, any single state would have effective veto power over the offer even if it received the enthusiastic endorsement of all the other states.[31]

We think that Illinois' tenuous interest in protecting resident shareholders and regulating control transfers cannot constitutionally justify the Illinois Act's burdensome impact on free-flowing commerce. The Illinois Act's primary burden, interference with securities transactions throughout the nation, inheres in the Act itself and seems relatively concrete, whereas the local impact of changes in corporate control, and the actual protection investors may receive through additional disclosure and delay, are often, as in the case before us, quite speculative.

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[31] This criticism is somewhat muted with respect to the Illinois Act because of the Act's comity provision, Ill. Rev. Stat. ch. 121½, § 137.53 (1979), which provides:

> The registration and filing requirements of . . . this Act shall not apply to a take-over offer if the Secretary has determined that another jurisdiction has, or other jurisdictions have, statutes or rules, which are applicable and are being applied and which afford protection to securityholders located in this State substantially equal to that afforded such securityholders by this Act.

State takeover statutes have also been said to burden interstate commerce by preventing the removal of local business out of state. *See Kidwell, supra* at 1282. Dixon denies that the Illinois Act was intended to have such an effect, and MITE has not argued that the Act is so economically protectionist as to be illegal *per se*. *Cf. Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970). There is no evidence in the record as to what the actual effect of the Act in this regard has been.

Indeed, as we noted in the context of preemption, in some instances at least, grossly prolonged delay may redound to the stockholders' detriment. Thus, because it substantially obstructs interstate commerce, without countervailing local benefit, the Illinois Act violates the commerce clause, and is therefore unconstitutional.

IV. CONCLUSION

Try as we may, we have been unable to square the Illinois Act with the Williams Act and with the constitutional prohibition against burdens on interstate commerce. We do not believe that all state legislation in this field, which imposes requirements going beyond the Williams Act, is unconstitutional merely because it is different. But we simply are of the view that state legislation must conform, *inter alia*, to the Congressional premise that too long extended delay may operate to discourage offers. We are of the further view that the Illinois Act burdens interstate commerce in a manner which is substantial, clear and present, and which is not offset by the speculative protection afforded local shareholders or that state's interest in regulating control changes, which have, at least as argued here, only prospective and uncertain impact. It may very well be possible to draft state takeover legislation to supplement (rather than to contradict) the Williams Act and the congressional *premises and purposes which it incorporates.* Although the new SEC tender offer rules may provide crucial constraints, we perceive no inherent reason why the Williams Act may not be validly complemented and investor protection furthered by state legislation. Suffice to say that under the instant circumstances, Illinois had not succeeded in enacting such an unexceptionable statute.

The judgment is therefore

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MITE CORPORATION and MITE HOLDINGS, INC., *Plaintiffs,* *vs.* **ALAN J. DIXON and CHICAGO RIVET & MACHINE CO.,** *Defendants.*	NO. 79 C 200

JUDGMENT ORDER

JOHN POWERS CROWLEY, District Judge

This matter having come before this Court for a hearing on a permanent injunction upon Count I of the Second Amended Complaint, the Parties' Stipulation, the Parties' Stipulation as to Documents, the exhibits admitted into evidence, the memoranda of the parties, and the arguments of the parties, by their respective counsel, in open court and the Court, being duly advised in the premises, finds and concludes:

1. This Court has subject matter jurisdiction over the claims asserted in the Second Amended Complaint and personal jurisdiction over MITE Corporation, MITE Holdings, Inc., Alan J. Dixon and Chicago Rivet & Machine Co.

2. Venue is proper in this district pursuant to Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa and 28 U.S.C. § 1391(b).

3. Plaintiffs, MITE Corporation and MITE Holdings, Inc., are corporations duly organized and existing under the laws of the State of Delaware.

4. The common stock of Chicago Rivet & Machine Co. is registered with the Securities and Exchange Commission pursuant to Section 12(g) of the Securities Exchange Act of 1934 and is traded on the American Stock Exchange, which is a national securities exchange.

5. Chicago Rivet & Machine Co. presently has Eight Hundred Sixty-Six Thousand Two Hundred Sixty-Four (866,264) shares of Common stock issued and outstanding and has Two Thousand One Hundred Eighty-One (2,181) shareholders of record. Five Hundred Eighty-Nine (589) shareholders owning Three Hundred Seventy-Seven Thousand Three Hundred Ninety-Five (377,395) shares of Chicago Rivet & Machine Co.'s common stock have addresses of record in Illinois and One Thousand Five Hundred Ninety-Two (1,592) shareholders owning Four Hundred Eighty-Eight Thousand Eight Hundred Sixty-Nine (488,869) shares have addresses of record outside Illinois.

6. On January 19, 1979 MITE Holdings, Inc. filed a Schedule 14D-1 with the Securities Exchange Commission pursuant to Section 14(d)(1) of the Securities Exchange Act and Rule 14D-1 promulgated thereunder with respect to proposed cash tender offers.

7. Under the Williams Act, a cash tender offer may commence immediately upon filing a Schedule 14D-1. The offer must remain open for at least seven days.

8. On or about January 19, 1979, MITE Holdings, Inc., a wholly-owned subsidiary of MITE Corporation, proposed to make a tender offer to purchase any and all of the outstanding shares of the common stock of Chicago Rivet & Machine Co. at Twenty-Eight Dollars ($28.00)

per share, a premium of more than Four Dollars ($4.00) per share over the market price in the period immediately preceding the announcement of the offer.

9. The proposed tender offer presents a transaction in interstate commerce of more than Twenty-Three Million Dollars ($23,000,000).

10. MITE Holdings, Inc.'s proposed offer to purchase the common stock of Chicago Rivet & Machine Co. was intended to comply with the requirements of the Williams Act and would have been made to all of the shareholders of Chicago Rivet & Machine Co. throughout the United States, not just shareholders residing in Illinois.

11. For purposes of the Illinois Act, Chicago Rivet & Machine Co. is a "target company" because Chicago Rivet & Machine Co. has its principal executive office in Illinois and is organized under the laws of Illinois (Illinois Act § 2.10(2)(a) and (b)). The Illinois Act, therefore, purports to regulate MITE Holdings, Inc.'s proposed tender offer for any and all shares of Chicago Rivet & Machine Co. common stock.

12. On January 22, 1979, Chicago Rivet & Machine Co. filed a Complaint in Equity alleging that MITE Corporation and MITE Holdings, Inc. were in violation of the Pennsylvania Takeover Law. Chicago Rivet & Machine Co. sought an ex parte order from the Court of Common Pleas of Blair County, Pennsylvania to enjoin MITE Corporation and MITE Holdings, Inc. from proceeding with the proposed cash tender offer. The Honorable Eugene J. Ianuzzi granted Chicago Rivet & Machine Co.'s request and enjoined MITE Corporation and MITE Holdings, Inc. from proceeding with their proposed cash tender offer pending a further hearing which the Court set for January 26, 1979.

13. On January 22, 1979, Chicago Rivet & Machine Co. also filed a Complaint before the Pennsylvania Securities Commission alleging that MITE Corporation and

MITE holdings, Inc. were in violation of the Pennsylvania Takeover Law. Chicago Rivet & Machine Co. requested the Pennsylvania Securities Commission to enforce the Pennsylvania Takeover Law against MITE Corporation and MITE Holdings, Inc.

14. On January 23, 1979 MITE Corporation and MITE Holdings, Inc. removed the action filed in the Court of Common Pleas of Blair County, Pennsylvania, to the United States District Court for the Western District of Pennsylvania.

15. On January 24, 1979 MITE Corporation and MITE Holdings, Inc. filed a Complaint in the United States District Court for the Western District of Pennsylvania seeking to have the Pennsylvania Takeover Law declared unconstitutional and seeking to enjoin its application or enforcement by Chicago Rivet & Machine Co. or by the Pennsylvania Securities Commission as applied to the proposed tender offer. On January 26, 1979 this action was consolidated with the removed action already pending in the Western District Court of Pennsylvania.

16. On January 25, 1979 the Western District Court of Pennsylvania entered a status quo order by consent of the parties and continued the matters pending before it until January 30, 1979.

17. On January 31, 1979 the Pennsylvania Securities Commission entered a Final Order determining that the Commission would not seek to invoke or enforce the Pennsylvania Takeover Law against MITE Corporation's or MITE Holdings, Inc.'s proposed cash tender offer.

18. On February 1, 1979 the Western District Court of Pennsylvania denied Chicago Rivet & Machine Co.'s motion to extend the status quo order previously entered by the Court and denied Chicago Rivet & Machine Co.'s motion for a temporary restraining order.

19. On February 1, 1979 Chicago Rivet & Machine Co. filed a Petition for Review with the Commonwealth Court of Pennsylvania. The petition challenged the Pennsylvania Securities Commission's decision not to invoke or enforce the Pennsylvania Takeover Law as applied to MITE Corporation's and MITE Holdings, Inc.'s proposed cash tender offer.

20. On February 1, 1979, Alan J. Dixon executed a Temporary Cease and Desist Order and Notice of Hearing finding that the matter is properly within the jurisdiction of the Secretary of State and that the provisions of Section 4.A of the Illinois Act are about to be violated and ordering MITE Corporation and MITE Holdings, Inc., among other matters, to "cease and desist all further action to make a tender offer to security holders of the Chicago Rivet & Machine Co." Alan J. Dixon notified plaintiffs that he intended to serve this order and notice on plaintiffs on February 5, 1979.

21. On February 2, 1979 Chicago Rivet & Machine Co. gave plaintiffs a letter stating that it would bring suit in the Circuit Court of Cook County, Illinois, seeking a temporary restraining order against MITE Holdings, Inc.'s proposed tender offer because MITE Holdings, Inc. was violating the Illinois Act.

22. On February 2, 1979 this Court entered an order preliminarily enjoining Alan J. Dixon from serving and issuing any cease and desist order or notice of hearing or from otherwise invoking, applying, or enforcing the Illinois Business Take-Over Act or any orders, rules or regulations issued pursuant to it, against MITE Corporation or MITE Holdings, Inc. or any officer, director, agent, employee or financial, business or legal advisor of either plaintiff or those acting on their behalf in connection with plaintiffs' proposed tender offer for the shares of Chicago Rivet & Machine Co. Pursuant to the request of Alan J. Dixon and Chicago Rivet & Machine Co., the Court entered its order

as a preliminary injunction. This Court denied Chicago Rivet & Machine Co.'s request for a stay in order to appeal this Court's decision to the Seventh Circuit Court of Appeals by February 5, 1979. Chicago Rivet & Machine Co. has not appealed to or requested a stay from the Seventh Circuit, although the time within which it may do either has not expired.

23. On February 5, 1979 MITE Holdings, Inc. published in the national edition of the *Wall Street Journal* its offer to purchase any and all of the outstanding shares of Chicago Rivet & Machine Co. at a price of Twenty-Eight Dollars ($28.00) per share.

24. The offer to purchase the common stock of Chicago Rivet & Machine Co. will be made to all its shareholders throughout the United States, not just shareholders residing in Illinois.

25. The Illinois Act clearly interferes with the purposes and objectives of the Williams Act. Provisions requiring advance notice of the tender offer, requirements concerning the duration of the offer and pro rata purchase and withdrawal provisions, among others, of the Illinois Act explicitly conflict with comparable provisions of the Williams Act and constitute obstacles to the accomplishment of objectives of the Williams Act.

26. The Illinois Act contravenes the purpose and spirit of the Williams Act by upsetting the carefully balanced neutrality of the federal provisions and by providing, contrary to the Congressional scheme, substantial advantages to the target corporation to defeat or delay a tender offer and by imposing, likewise contrary to Congressional intent, substantial obstacles to the ability and right of shareholders to accept tender offers which fully comply with federal requirements.

27. The Illinois Act as a whole and in particular provisions conflicts with the Williams Act. These provisions include among others the following:

(a) a required minimum twenty (20) business day waiting period before a tender offer can be commenced (Illinois Act § 4E), a concept explicitly rejected by Congress;

(b) a mandatory indefinite delay of a tender offer if a majority of the target company's "outside" directors or an Illinois shareholder or group of shareholders holding beneficially or of record 10% of the shares of the target request a hearing, which must then be held (Illinois Act § 7), whereas the Williams Act provides for no pre-tender offer hearings;

(c) a mandatory indefinite delay of a tender offer if the Illinois Secretary of State unilaterally orders a hearing because he determines, in his sole judgment, that such delay is necessary for the protection of Illinois shareholders of the target company (Illinois Act § 7.A.), whereas the Williams Act provides for no pre-tender offer hearings;

(d) an indefinite delay of the commencement of an offer in the event a hearing is requested, pending a decision by the Illinois Secretary of State (Illinois Act § 7A, C, D), whereas the Williams Act permits the offer to commence immediately;

(e) a required twenty (20) day period for a tender offer to remain open (Illinois Act § 9B), whereas the Williams Act permits a tender offer to be completed within seven (7) days of announcement (ten (10) days in the case of a partial offer);

(f) withdrawal rights at any time within seventeen (17) days (Illinois Act § 9C), which differs substantially from and is in conflict with the seven (7) day provision under the Williams Act;

(g) denial of effectiveness of a proposed tender offer if, in the sole opinion of the Illinois Secretary of State, (i) the offer is "inequitable," even though

federal law requires the marketplace to decide upon the fairness of the offer, or (ii) the offer fails to provide full and fair disclosure to the offerees under Illinois law (Illinois Act § 7E), even though the offer is in compliance with federal disclosure standards;

(h) proration of acceptances of a partial offer for the entire period of the offer (Illinois Act § 9D), whereas the Williams Act requires proration of only those acceptances made during the initial ten (10) days of the offer;

(i) pre-tender offer disclosures (Illinois Act § 4B), which cause substantial disruptions in national securities markets, a requirement which was explicitly rejected by Congress;

(j) burdensome disclosure of speculative and immaterial information (Illinois Act § 4C), not required to be disclosed under the Williams Act, with the effect of further delaying a tender offer; and

(k) prohibition of tender offers which are not made to shareholders of the target company who are residents of Illinois on the same terms as to shareholders elsewhere (Illinois Act § 9A), the effect of which is that the Illinois Act competes with the Williams Act as a national system of regulation.

28. By impeding plaintiffs' cash tender offer for Chicago Rivet & Macine [*sic.*] Co., the Illinois Act imposes a substantial burden on interstate commerce in violation of the Commerce Clause of the Constitution of the United States.

29. The Illinois Act violates the Securities Exchange Act of 1934, including, but not limited to, Section 28, which preempts state regulation that conflicts with the provisions of the Securities Exchange Act of 1934.

30. The Illinois Act violates the Constitution of the United States because it conflicts with, and stands as an obstacle to the accomplishment of, the objectives of Congress expressed in the Williams Act amendments to the Securities Exchange Act of 1934 and pursuant to the Supremacy Clause contained in Article IV, Clause 2, of the United States Constitution therefore is preempted.

31. The Illinois Act violates the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States because the Illinois Act imposes a substantial, direct and adverse burden on interstate commerce and serves no legitimate local interest adequate to justify the clearly excessive burden on interstate commerce which it imposes.

32. The Illinois Act is null and void on its face and as applied to MITE Corporation's and MITE Holdings, Inc.'s cash tender offer for any and all shares of Chicago Rivet & Machine Co. because the Illinois Act violates the Commerce Clause of the Constitution of the United States and is preempted by the Williams Act provisions of the Securities Exchange Act of 1934.

33. Denial of a permanent injunction against enforcement of the Illinois Act would cause plaintiffs irreparable injury by depriving them of their federal statutory rights, by imposing on them lengthy delays and giving undue advantage to the management of the "target company" by using these delays to frustrate the tender offer.

34. The injury which would be suffered by plaintiffs if the permanent injunction were denied outweighs any possible injury to defendants caused by the issuance of the injunction. The public interest is served by the issuance of the injunction. There is no good cause to deny plaintiffs' request for a permanent injunction at this time.

35. Plaintiffs would have no remedy at law against Chicago Rivet & Machine Co. or Alan J. Dixon for attempting to enforce the Illinois Act.

36. The Court further fully adopts its oral findings of facts and conclusions of law as stated in open court on February 2, 1979 and February 8, 1979 and incorporates them in this order as if fully set forth herein.

IT IS NOW, THEREFORE

ORDERED that the Illinois Take-Over Act (as amended, effective September 8, 1978) is declared to be null and void and of no force and effect because it violates the Commerce Clause of the United States Constitution and is preempted by the Williams Act provisions of the Security Exchange Act of 1934; and it is further

ORDERED that Alan J. Dixon, his successors, agents, servants, and attorneys and all persons in active concert or participation with him be, and they are, permanently enjoined from serving or issuing any cease and desist order or notice of hearing or from otherwise invoking, applying, or enforcing the Illinois Business Take-Over Act or any orders, rules or regulations issued pursuant to it, against plaintiffs or any officer, director, agent, employee or financial, business or legal advisor of either plaintiff or those acting on their behalf in connection with plaintiffs' proposed tender offer for the shares of Chicago Rivet & Machine Co.

John Powers Crowley
United States District Judge

DATED: February 9, 1979.

Opinion by Judge Cudahy

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS[1]

For the Seventh Circuit

Chicago, Illinois 60604

October 17, 1980

Before

Hon. ROBERT A. SPRECHER, Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. EDWARD DUMBAULD, Senior District Judge*

MITE CORPORATION and MITE HOLDINGS, INC.,
Plaintiffs-Appellees,

No. 79-1267

vs.

ALAN J. DIXON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 79-C-200
John Powers Crowley, Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

* The Honorable Edward Dumbauld, Senior District Judge of the Western District of Pennsylvania, sitting by designation.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

ALAN J. DIXON, *Appellant,* vs. MITE CORPORATION and MITE HOLDINGS, INC., *Appellees.*	NO. 79-1267

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that ALAN J. DIXON, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final order, affirming the judgment of the district court that the Illinois Business Take-Over Act (Ill.Rev.Stat., 1979, ch. 121½, § 137.51) is unconstitutional, entered in this action on October 17, 1980.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Respectfully submitted,

TYRONE C. FAHNER
Attorney General
State of Illinois.

By: RUSSELL C. GRIMES, JR.

RUSSELL C. GRIMES, JR.
Assistant Attorney General
160 North LaSalle Street
Suite 800
Chicago, Illinois 60601
(793-5635)
Counsel for Appellant.

PROOF OF SERVICE

STATE OF ILLINOIS }
COUNTY OF COOK } ss.:

GERI BRESNAHAN, being first duly sworn, on oath deposes and states that she served a copy of the attached Notice of Appeal to the Supreme Court of the United States upon:

MR. JEROLD S. SOLOVY
Jenner & Block
One IBM Plaza
Chicago, Illinois

by depositing same postpaid and addressed as above at the United States Post Office box located at 160 North LaSalle Street, (lobby), Chicago, Illinois 60601, on the 5th day of January, 1981, before the hour of 5:00 p.m. All parties required to be served have been served. Such service is in compliance with Rule 33(c) of the Rules of the Supreme Court of the United States.

GERI BRESNAHAN

SUBSCRIBED AND SWORN to
before me this 5th day
of January, 1981.

NOTARY PUBLIC

ILLINOIS BUSINESS TAKE-OVER ACT

AN ACT to regulate take-over offers involving business firms organized in Illinois or doing business in Illinois and to amend a certain Act in connection therewith. P.A. 80—1421, approved and eff. Sept. 8, 1978.

137.51. Short title

§ 1. Short Title. This Act shall be known as "The Illinois Business Take-Over Act".

137.51-1. Findings and purpose

§ 1.1. Findings and purpose. In recent years numerous companies have been subjected to take-over offers in which equity securities were acquired suddenly by means of tender offers. Many of these tender offers have been made without advance notice and without giving securityholders of the acquired company adequate time to consider the offer and without giving management of the acquired company adequate time to evaluate alternatives so that they might recommend a course of action that would be in the best interests of all securityholders. The purpose of this Act shall be to protect the interests of Illinois securityholders of companies having a close connection with this State without unduly impeding take-over offers, and this Act shall be interpreted so as to strike a balance that does not favor either management of a target company or an offeror.

137.52. Definitions

§ 2. Definitions. As used in this Act, unless the context requires otherwise, the terms defined in Sections 2.01 through 2.10[1] shall have the meanings ascribed to them in those Sections.

[1] Paragraphs 137.52-1 through 137.52-10 of this chapter.

137.52-1. Affiliate defined

§ 2.01. "Affiliate" of, or a person "affiliated" with, a specified person, means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

137.52-2. Control defined

§ 2.02. "Control" (including the terms "controlling", "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

137.52-3. Equity security defined

§ 2.03. "Equity security" means any stock or other security carrying, at the time of the take-over offer, the right to vote for directors or persons performing substantially similar functions. Equity security also includes any security presently convertible or exercisable into an equity security; any warrant, option or right to purchase an equity security; any security carrying any warrant, option or right to purchase an equity security; any limited partnership interest; and any other security which for the protection of investors is deemed an equity security pursuant to rule or order of the Secretary.

137.52-4. Offeree defined

§ 2.04. "Offeree" means a beneficial owner of equity securities which an offeror proposes or offers to acquire or acquires in connection with a take-over offer.

137.52-5. Offeror defined

§ 2.05. "Offeror" means a person who makes or in any way participates in making a take-over offer, and includes all affiliates of that person. The term does not include a financial

institution or dealer loaning funds, or extending credit to any offeror in the ordinary course of its business, or any accountant, attorney, financial institution, dealer, soliciting dealer, newspaper or magazine of general circulation, consultant, or other person, furnishing information, services, or advice to, or performing ministerial or administrative duties for, an offeror and not otherwise participating in the take-over offer.

137.52-6. Person defined

§ 2.06. "Person" means a natural person, corporation, association, partnership, trust, group, syndicate or other entity.

137.52-7. Secretary defined

§ 2.07. "Secretary" means the Secretary of State of Illinois.

137.52-8. Securities Commissioner defined

§ 2.08. "Securities Commissioner" means the administrator appointed by the Secretary to administer the Securities Department.

137.52-9. Take-over offer defined

§ 2.09. "Take-over offer" means the offer to acquire or the acquisition of any equity security of a target company, pursuant to a tender offer or request or invitation for tenders, if after acquisition the offeror would be, directly or indirectly, a beneficial owner of more than 5% of the class of the outstanding equity securities of the target company which is the subject of the take-over offer. The term does not include an offer to acquire or acquisition of any equity security of a target company pursuant to:

(1) An offer effected by or through a dealer in the ordinary course of its business without solicitation of offers to sell that class of equity securities of the target company;

(2) An offer made to owners of a class of equity securities of a target company if the number of record owners of that class of equity securities of the target company does not exceed 100 at the time of the offer;

(3) An offer, if the acquisition by the offeror of such security, together with all other acquisitions by the offeror of equity securities of the same class during the preceding 12 months, would not exceed 2% of that class of outstanding equity securities of the target company;

(4) An offer by an issuer to purchase or otherwise acquire its own securities;

(5) An offer determined by rule or order of the Secretary to be a take-over offer for which regulation under this Act is not necessary for the protection of securityholders of the target company in this State; or

(6) An offer determined by rule or order of the Secretary to be a take-over offer that is not made for the purpose of, and does not have the effect, of changing or influencing the control of a target company.

137.52-10. Target company defined

§ 2.10. "Target company" means a corporation or other issuer of securities (1) of which 10% of the outstanding securities of the class of its equity securities which is the subject of a take-over offer is held of record by securityholders located in this State as determined by post office address as shown on the records of the issuer, or (2) which meets any two of the following conditions:

(a) has its principal executive office in this State;

(b) is organized under the laws of this State;

(c) has at least 10% of its stated capital and paid-in surplus represented in this State.

137.53. Comity

§ 3. Comity. The registration and filing requirements of Sections 4, 5 and 6 of this Act[1] shall not apply to a take-over offer if the Secretary has determined that another jurisdiction has, or other jurisdictions have, statutes or rules, which are applicable and are being applied and which afford protection to securityholders located in this State substantially equal to that afforded such securityholders by this Act.

[1] Paragraphs 137.54, 137.55 and 137.56 of this chapter.

137.54. Registration requirements

§ 4. Registration requirements. A. It is unlawful for any person to make a take-over offer unless the take-over offer is registered under this Act, or is exempted therefrom by rule or order of the Secretary, or unless the provisions of Section 3 or 19[1] apply.

B. Before a take-over offer becomes registered under this Act, the offeror shall file with the Secretary and deliver by certified mail to the target company at its principal office a registration statement containing the information prescribed in subsection C of this Section, and shall, not later than the date of filing of the registration statement, publicly disclose the intent to make a take-over offer and the material terms of the proposed take-over offer.

C. The registration statement shall be filed on forms prescribed by the Secretary, shall be accompanied by a consent by the offeror to service of process, all solicitation materials then required to be filed by this Act and the filing fee specified in this Act, and shall contain the following information and such additional information as the Secretary by rule or order prescribes:

(1) The identity of and material information concerning the offeror, including:

(a) If the offeror is a corporation or other entity but not a natural person, information concerning its organization, including the year and jurisdiction of its

organization, a description of each class of its equity securities and long-term debt, a description of the business done by the offeror and its affiliates and any material changes therein during the past three years, a description of the location and character of the principal properties of the offeror and its affiliates, a description of any material legal or administrative proceedings during the last 5 years in which the offeror or any of its affiliates is or was a party, or any criminal convictions or penalties (other than traffic violations and similar misdeameanors) during the last 5 years, the names of all directors and executive officers of the offeror and their material business activities and affiliations during the past three years, and audited financial statements of the offeror and its affiliates for its three most recent annual accounting periods and unaudited interim financial statements for the offeror's most recent period practicable if the date of the audited financial statement precedes the date of filing by more than 90 calendar days.

(b) If the offeror is a natural person, material information concerning the background of that person, including business activities and affiliations during the past three years, a description of any material legal or administrative proceeding during the last 5 years in which that person is or was a party, or any criminal convictions or penalties (other than traffic violations and similar misdeameanors) during the last 5 years, and such financial statements as the Secretary may prescribe by rule or order.

(2) The source and amount of funds or other consideration used or to be used in acquiring the equity securities, including a statement describing any securities which are being offered in exchange for the equity securities of the target company, and if any part of the acquisition price is or will be represented by borrowed funds or other consid-

eration, a description of the transaction and the names of all the parties, all material terms of such borrowing and any plans or arrangements to finance or repay such borrowing.

(3) The purpose or purposes of the take-over offer including a statement of any plans or proposals which relate to or which would result in an extraordinary corporate transaction involving the target company, such as liquidating the target company, selling a material amount of its assets, effecting a merger or consolidation, or making any other material change in its business, corporate structure, management, or personnel.

(4) The number of shares or units of any equity security of the target company of which the offeror or any affiliate of the offeror is the record or beneficial owner or which the offeror or any affiliate of the offeror has a right to acquire or direct the vote of, directly or indirectly.

(5) Information as to any contracts, arrangements, or understandings with any person with respect to any equity security of the target company, including transfers of any equity security, joint ventures, loan or option arrangements, puts and calls, guarantees of loans, guarantees against loss, guarantees of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom those contracts, arrangements or understandings have been entered into.

(6) Information as to any contracts, arrangements or understandings with any person who is an officer, director, or a person holding a similar position, or a record or beneficial owner of equity securities of the target company with respect to the tender of any equity securities of the target company, the purchase by the offeror of any equity securities owned by that person otherwise than pursuant to the take-over offer, the retention of any person in its present position or in any other management position or

with respect to that person giving or withholding a favorable recommendation regarding the take-over offer.

(7) Information as to any material transaction or negotiations regarding any material transaction, during the last 3 years, between the offeror or any affiliate of the offeror and the target company or any affiliate of the target company.

(8) A description of the provisions made or to be made for providing all material information concerning the take-over offer to offerees, including a copy of the proposed take-over offer in the form proposed to be published, sent or given to offerees.

D. The Secretary may accept, in lieu of the registration statement meeting the requirements of subsection C of this Section, a registration statement form or other filing required by a federal or state government agency or approved by an association of state regulatory agencies which the Secretary has determined by rule or order to encompass disclosure requirements substantially equivalent to those contained in subsection C of this Section.

E. A take-over offer shall become registered 20 business days after the date of filing the registration statement or an amendment thereto with the Secretary, unless accelerated by order or delayed by written notification, or unless prior thereto the Secretary calls a hearing with respect to the offer.

[1] Paragraphs 137.53 or 137.69 of this chapter.

137.55. Filing of solicitation materials

§ 5. Filing of solicitation materials. Copies of the initial public disclosure of the intent to make a take-over offer and all advertisements, ciculars, letters or other materials published, sent or given by the offeror or the target company or an affiliate of the target company, soliciting or requesting the acceptance or rejection of the take-over offer, shall be filed with the Secretary and delivered to the target company or offeror at its principal executive office before the time copies of the materials are first published, sent or given to offerees or otherwise used.

137.56. Amendments

§ 6. Amendments. If any material change occurs in any information required to be filed pursuant to this Act prior to the termination of the take-over offer, an amendment shall be filed promptly with the Secretary, who may delay, terminate, condition, suspend or prohibit the reigstration of the take-over offer or who may allow the proposed registration or registration of the take-over offer to be withdrawn if the Secretary, finding the withdrawal consistent with the public interest and the protection of offerees in this State, consents thereto.

137.57. Hearings

§ 7. Hearings. A. The Secretary shall call a hearing if the Secretary deems it necessary for the protection of offerees in this State or if within 15 business days after the date of filing the registration statement a written request for a hearing is submitted to the Secretary, by a majority of the directors of the target company who are not officers or employees of the target company or by a person or persons who are located in this State as determined by post office address as shown on the records of the target company and who hold of record or beneficially, or both, at least 10% of the outstanding shares of any class of equity securities which is the subject of the take-over offer.

B. Any request for a hearing shall be accompanied by the filing fee and a statement of the reasons for the request. If a hearing is called, the take-over shall not become registered until so declared by order of the Secretary.

C. Any hearing called by the Secretary under this Section shall be commenced before the Securities Commissioner or a person designated by the Secretary within 10 business days following the date the hearing request is received by the Secretary, with notice to the offeror and target company, unless the date for the hearing is extended by the Secretary for the convenience of the parties or for the protection of offerees in

this State. The expenses reasonably attributable to any hearing held under this Act shall be charged ratably to the parties exclusive of the Secretary.

D. A determination shall be made by the Secretary in writing within 15 business days after the conclusion of the hearing, unless such time is extended by order of the Secretary as being in the interest of offerees in this State.

E. If the Secretary finds that the take-over offer fails to provide full and fair disclosure to the offerees of all material information concerning the take-over offer, or that the take-over offer is inequitable or would work or tend to work a fraud or deceit upon the offerees, or that the take-over will not be made to all offerees in this State on substantially equal terms, or that the take-over offer would violate this Act, the Secretary shall by order deny the registration of the take-over offer or condition its registration upon certain changes or modifications. If the Secretary finds that the take-over offer provides full and fair disclosure to the offerees of all material information concerning the take-over offer, and that the take-over offer is made to all offerees in this State on substantially equal terms and the Secretary does not find that the offer is inequitable or would work or tend to work a fraud or deceit upon offerees in this State, or would violate this Act, the Secretary shall by order register the take-over offer. Registration of the take-over offer does not constitute approval of the offer by the Secretary.

137.58. Fraudulent and deceptive practices

§ 8. Fraudulent and deceptive practices. It is unlawful for any person to engage in any fraudulent, deceptive or manipulative acts or practices in connection with a take-over offer. Fraudulent, deceptive and manipulative acts or practices include, without limitation, the following:

(1) Solicitation of any offeree for acceptance or rejection of a take-over offer, or acquisition of any equity security of a target company pursuant to a take-over offer, that is not registered or exempt under this Act, except that the target company may communicate with its security-

holders as permitted by the Securities Exchange Act of 1934[1] and the rules thereunder, as amended from time to time, or by rule or order of the Secretary.

(2) Making any untrue statement of a material fact or omitting to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

(3) Sale by any officer, director or affiliate of a target company of all or any part of their equity securities at a price higher than that to be paid to other offerees pursuant to the offer, unless the sales are made at the then existing market price.

(4) Acquisition by the offeror, after initial public disclosure of the intent to make a take-over offer and prior to its termination, of equity securities of the target company otherwise than pursuant to the take-over offer.

[1] 15 U.S.C.A. § 78a et seq.

137.59. Limitations on offerors

§ 9. Limitations on offerors. A. No offeror may make a take-over offer in this State to offerees who are domiciled in this State unless the offer is made on substantially equal terms to those made to offerees who are domiciled outside this State.

B. The take-over offer shall remain open for a minimum offering period of 20 calendar days from the time it is first made or from the time its terms are materially changed.

C. An offeror shall provide that any equity securities of a target company deposited or tendered pursuant to a take-over offer may be withdrawn by or on behalf of any offeree at any time during the first 17 calendar days after the time the take-over offer is first made or the time its terms are materially changed and after 60 calendar days from the time the take-over offer is first made.

D. If an offeror makes a take-over offer for less than all the outstanding equity securities of any class, and if the number of securities deposited or tendered pursuant thereto is greater than the number the offeror is bound or willing to accept and pay for, the securities shall be accepted pro rata, disregarding fractions, according to the number of securities deposited or tendered by each offeree.

E. If an offeror varies the terms of a take-over offer before its expiration date by increasing or decreasing the consideration offered to the offerees, the offeror shall pay for all equity securities accepted the highest consideration paid for any of such securities, whether the securities have been accepted by the offeror before or after the variation in the terms of the offer.

F. No offeror shall make a take-over offer at any time when an administrative or injunctive proceeding has been brought by the Secretary against the offeror for violation of this Act or The Illinois Securities Law of 1953, as amended,[1] which proceeding has not been finally determined.

G. No offeror may acquire, remove or exercise control, directly or indirectly, over any assets of a target company located in this State pursuant to a take-over offer unless the offer is registered, exempted or excluded under this Act, except that an offeror shall not be deemed to be precluded from acquiring, removing or exercising control over assets of a target company if such acquisition, removal or exercise of control is not related directly or indirectly to a take-over offer or as otherwise permitted by rule or order of the Secretary.

[1] Paragraph 137.1 et seq. of this chapter.

137.60. Rules and administration

§ 10. Rules and administration. A. This Act shall be administered by the Secretary who may promulgate rules as may be necessary to carry out the provisions of this Act including rules defining fraudulent, deceptive, and manipulative acts and practices, and defining any terms, whether or not used in this Act, insofar as the definitions are not inconsistent

with the provisions of this Act. Among other things, the Secretary shall have authority, for the purposes of this Act, to prescribe the form or forms in which required information shall be set forth, accounting practices, and the items or details to be shown in financial statements. The rules adopted by the Secretary under this Act shall be effective in the manner provided for in "The Illinois Administrative Procedure Act", approved September 22, 1975, as amended.[1] No provisions of this Act imposing any liability or penalty shall apply to any act done or omitted in good faith in conformity with any rule or order of the Secretary under this Act, notwithstanding that such rule or order may, after such act or omission be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

B. Whenever it shall appear to the Secretary, either upon complaint or otherwise, that any provision of this Act, or of any rule or order issued under authority thereof, has been or is about to be violated, the Secretary has the discretion to require or permit such person to file with the Secretary a statement in writing under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which the Secretary believes to be in the public interest to investigate, and may investigate such facts and issue orders and notices, including cease and desist orders and notices.

C. The Secretary by rule or order may require the offeror or the target company to file any additional documents, exhibits and information that is material to the take-over offer and may permit by rule or order the omission of any of the information specified by this Act if the Secretary determines that the information is not required for the protection of the offerees.

D. For the purpose of all investigations which, in the opinion of the Secretary, are necessary and proper for the enforcement of this Act, the Secretary, or a person designated by the Secretary, is empowered to administer oaths and affirmations, subpoena witnesses, take evidence and require the production of any books, papers, or other documents which are deemed relevant or material to the inquiry.

E. The Secretary shall have the discretion to issue interpretive opinions upon receipt of a written request, containing the relevant facts and legal issues, and the filing fee therefor.

F. In no case shall the Secretary, the Securities Commissioner or any person designated by the Secretary, in the administration of this Act, incur any official or personal liability by instituting an injunction or other proceeding or by registering or denying registration to, or conditioning or suspending or terminating the registration of a take-over offer or consenting to the withdrawal of the proposed registration or registration of the take-over offer.

[1] Chapter 127, ¶ 1001 et seq.

137.61. Fees

§ 11. Fees. The filing fee for a registration statement filed pursuant to this Act by an offeror shall be $1,250. The filing fee for a hearing pursuant to this Act shall be $500. The filing fee for an interpretive opinion shall be $250. In no event shall these fees be returnable.

137.62. Injunctions

§ 12. Injunctions. A. In addition to all other remedies, the Secretary through the Office of the Attorney General may bring an action in any court of competent jurisdiction in the name and on behalf of the State of Illinois against any person or persons, who appear to have engaged in, or be about to engage in, an act or practice constituting a violation of this Act, to enjoin those persons from continuing or doing any act in violation of this Act, or to enforce compliance with this Act. In any court proceedings the Secretary may apply for, and on due showing be entitled to have, the court's subpoena requiring the appearance of any defendant and its employees or agents and the production of documents, books and records, as may appear necessary for the hearing of the petition, to testify and give evidence concerning the acts or conduct or things complained of

in the action. The fees of subpoenaed witnesses under this Act for attendance and travel shall be the same as fees of witnesses before the Circuit Courts of this State, such fees to be paid when the witness is excused from further attendance, provided such witness is subpoenaed at the instance of the Secretary; and payment of such fees shall be made and audited in the same manner as other expenses of the Secretary. Whenever a subpoena is issued at the request of a complainant or respondent or defendant as the case may be, the Secretary may require that the cost of service and the fee of the witness shall be borne by the party at whose instance the witness is summoned. The Secretary shall have the discretion to require a deposit to cover the cost of such service and witness fees and the payment of the legal witness fee and mileage to the witness served with subpoena. A subpoena issued under the provisions of this Act shall be served in the same manner as a subpoena issued out of a court of record. Upon a proper showing, the court may grant a temporary restraining order or preliminary injunction or permanent injunction or may order rescission of any sales, tenders for sale, purchases, or tenders for purchase of equity securities determined to be unlawful under this Act or any rule or order of the Secretary.

B. Whenever it shall appear that any person has engaged in or is about to engage in any act or practice constituting a violation of this Act, any offeror, target company, security holder of an offeror or target company, or any other party in interest may bring an action in any court of competent jurisdiction, including any court of competent jurisdiction in the county or district in which the party in interest resides, or where the person has its principal office or registered office or where any part of the transaction has or will take place, to enjoin that person from continuing or doing any act or practice constituting a violation of or to enforce compliance with this Act. Upon a proper showing, the court shall grant a permanent or preliminary injunction or temporary restraining order or rescission of any sales, tenders for sale, purchases, or tenders for purchase of

equity securities determined to be a violation of this Act. A copy of the complaint shall be served upon the Office of the Secretary of State within 24 hours of filing. This may be done by personal service or certified mail.

137.63. Criminal prosecution

§ 13. Criminal prosecution. A. Any person who, in connection with a take-over offer, willfully makes or causes to be made to the Secretary any statement of a material fact which the person knows to be false, or willfully withholds or causes to be withheld from the Secretary any information the disclosure off which such person knows is necessary, in light of the circumstances, to make not misleading other statements of material facts made or caused to be made by such person to the Secretary, commits a Class 4 felony and upon conviction shall be subject to such punishment as provided by law.

B. Any person who, in connection with a take-over offer, willfully publishes or causes to be published any statement of a material fact which the person knows to be false, or willfully omits to publish information which the person knows is necessary, in light of the circumstances, to make not misleading other statements of material facts published or caused to be published by it, commits a Class 4 felony and upon conviction shall be subject to such punishment as provided by law.

C. Any person who willfully violates any provisions of this Act for which a specific criminal penalty is not otherwise provided shall be guilty upon conviction of a Class A misdemeanor, except that the fine therefor shall not exceed $10,000 per offense.

D. Nothing herein shall limit the power of the State to punish any person for conduct which constitutes a crime under any other statute.

E. Each of the acts specified shall constitute a separate offense and a prosecution or conviction for any one of such offenses shall not bar prosecution or conviction for any other offense.

F. Any person who shall be adjudicated guilty of a second or any subsequent offense specified in this Act, commits a Class 4 felony and shall be subject to such punishment as provided by law, except that the fine therefor shall not exceed $25,000 for such second or subsequent offense.

G. The Secretary may refer such evidence as is available concerning violations of this Act or of any rule or order hereunder to the Attorney General.

H. The Attorney General, with such assistance as may from time to time be requested of the State's Attorneys in the several counties, shall investigate suspected criminal violations of this Act and shall commence and try prosecutions under this Act. Prosecutions under this Act may be commenced by information or indictment. With respect to the commencement and trial of such prosecutions, the Attorney General shall have all of the powers and duties vested by law in State's Attorneys with respect to criminal prosectutions generally.

I. All prosecutions under this Act or based upon any provisions of this Act must be commenced within 3 years after the act or transaction constituting the violation upon which such prosecution is based.

137.64. Civil remedies

§ 14. Civil remedies. A. Any person who violates any provision of this Act in connection with a take-over offer or directly, materially and knowingly participates in such a violation shall be jointly and severally liable to any person suffering losses caused by such violation for:

(1) Damages in the amount of such loss (together with interest from the date of such loss); or

(2) Any equitable remedy, including but not limited to rescission, which any court of competent jurisdiction shall determine in its discretion to be just and equitable

under the circumstances. In any such suit the court may, in its discretion, assess reasonable costs, including reasonable attorneys' fees, against any party.

B. Every person who is found liable *for* damages may recover in contribution, as in cases of contract, from other persons who, if joined in the original suit, would have been liable to pay the same damages.

C. A person shall not be liable under this Section 14 if such person proves that such person did not know or, after inquiry, had reasonable gounds not to know of the existence of the facts upon which liability is alleged to exist.

D. The rights and remedies under this Act are in addition to any other rights or remedies that may exist at law or in equity.

137.65. Civil penalties

§ 15. Civil penalties. The Secretary through the Office of the Attorney General may bring an action in the name and on the behalf of the people of this State against any person, or agent of such person, domestic or foreign, to recover a penalty in a sum not to exceed $10,000 per violation for the commission of any act herein deemed illegal.

137.66. Period of limitation

§ Period of limitation. No action shall be maintained to enforce any liability or penalty created under this Act unless brought before the expiration of 3 years after the act or transaction constituting the violation. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act. Every cause of action under this Act survives the death of any person who might have been a plaintiff or defendant.

137.67. Certifications

§ 17. Certifications. In any civil or criminal action brought under this Act, a certificate under the seal of this State, signed by the Secretary, stating the presence or the absence of a filing

pursuant to the provisions of this Act, shall constitute prima facie evidence of a filing or the absence thereof pursuant to this Act and shall be admissible in any such action. Such certificate shall be furnished by the Secretary upon written request therefor and the payment of a certification fee of $2.

137.68. Service of process

§ 18. Service of process. A. A consent to service of process shall be in the form prescribed by the Secretary, shall be irrevocable, and shall provide that actions arising out of or founded upon any alleged violation of this Act may be commenced against the person executing such consent in any court of competent jurisdiction and proper venue within this State, by the service of process upon the Secretary.

Service of any process or pleading in any action against a person who has filed hereunder a consent to service of process upon the Secretary shall, if made on the Secretary, be in duplicate copies, one of which shall be filed in the Office of the Secretary of State and the other immediately forwarded by the Secretary by registered or certified mail to such person at its latest address on file in the Office of the Secretary of State.

B. (1) A take-over offer made to offerees in this State, whether effected by mail or otherwise, by any person (unless such offer is exempted or excluded) shall be equivalent to and shall constitute an appointment by such person of the Secretary, or successors in office, to be the true and lawful attorney for such person upon whom may be served all lawful process in any action or proceeding against such person, arising out of the take-over offer.

(2) Service of process under this subsection B shall be made by serving a copy upon the Secretary or any employee of that Office designated to accept such service, provided notice of such copy of the process is, within 10 calendar days thereafter, sent by certified mail by the plaintiff to the defendant, at the last known address of the defendant, and the plaintiff's affidavit

of compliance, in substantially such form as the Secretary may by rule prescribe, is appended to the summons. The Secretary shall keep a record of all such processes which shall show the date and hour of such service.

137.69. Exclusions from the Act

§ 19. Exclusions from the Act. A. If the target company is an insurance company or an insurance holding company, or a railroad or public utility holding or operating company or person, or any public carrier of passengers or freight, or a state-chartered bank or a national banking association, or a bank holding company with 90% or more of its consolidated assets comprised of assets of its bank subsidiary or subsidiaries, or a savings and loan association, subject to regulation by a federal or state agency and the change of control of such company is subject to approval by that agency, this Act shall not apply.

B. This Act shall not apply to any offer involving a vote by shareholders of the target company, pursuant to its articles of incorporation or the applicable corporation statute, on a merger, consolidation or sale of corporate assets or sale of its securities in exchange for cash or securities of another corporation, or both.

137.70. Application of the Act

§ 30. Application of the Act. A. All of the provisions of The Illinois Securities Law of 1953, as amended,[1] which are not in conflict with this Act shall apply to any take-over offer.

B. This Act shall be liberally construed to effect the purposes thereof.

C. In any proceeding under this Act, the burden of proving an exclusion, exemption or exception shall be upon the party alleging such matter or raising it as a defense.

D. If any provision or provisions of this Act shall be held invalid, the remainder of this Act shall not be affected thereby.

E. This Act shall not apply to any take-over offer that has been made to securityholders of a target company prior to the effective date of this Act unless the offeror elects to make such take-over offer subject to this Act.

[1] Paragraph 137.1 et seq. of this chapter.

15 U.S.C. § 78m(d):

(d)(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l*(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors—

(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 78c(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporate structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

(2) If any material change occurs in the facts set forth in the statements to the issuer and the exchange, and in the statement filed with the Commission, an amendment shall be transmitted to the issuer and the exchange and shall be filed with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

(4) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(5) The Commission, by rule or regulation or by order, may permit any person to file in lieu of the statement required by paragraph (1) of this subsection or the rules and regulations thereunder, a notice stating the name of such person, the number of shares of any equity securities subject to paragraph (1) which are owned by him, the date of their acquisition and such other information as the Commission may specify, if it appears to the Commission that such securities were acquired by such person in the ordinary course of his business and were not acquired for the purpose of and do not have the effect of changing or influencing the control of the issuer nor in connection with or as a participant in any transaction having such purpose or effect.

(6) The provisions of this subsection shall not apply to—

(A) any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933;

(B) any acquisition of the beneficial ownership of a security which, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, does not exceed 2 per centum of that class;

(C) any acquisition of an equity security by the issuer of such security;

(D) any acquisition or proposed acquisition of a security which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having

the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.

15 U.S.C. § 78n(d):

(d) (1) It shall be unlawful for any person, directly or indirectly, by use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, to make a tender offer for, or a request or invitation for tenders of, any class of any equity security which is registered pursuant to section 78*l* of this title, or any equity security of an insurance company which would have been required to be so registered except for the exemption contained in section 78*l*(g) (2) (G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940, if, after consummation thereof, such person would, directly or indirectly, be the beneficial owner of more than 5 per centum of such class, unless at the time copies of the offer or request or invitation are first published or sent or given to security holders such person has filed with the Commission a statement containing such of the information specified in section 78m(d) of this title, and such additional information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors. All requests or invitations for tenders or advertisements making a tender offer or requesting or inviting tenders of such a security shall be filed as a part of such statement and shall contain such of the information contained in such statement as the Commission may by rules and regulations prescribe. Copies of any additional material soliciting or requesting such tender offers subsequent to the initial solicitation or request shall contain such information as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors, and shall be filed with the Commission not later than the time copies of such material

are first published or sent or given to security holders. Copies of all statements, in the form in which such material is furnished to security holders and the Commission, shall be sent to the issuer not later than the date such material is first published or sent or given to any security holders.

(2) When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for purposes of this subsection.

(3) In determining, for purposes of this subsection, any percentage of a class of any security, such class shall be deemed to consist of the amount of the outstanding securities of such class, exclusive of any securities of such class held by or for the account of the issuer or a subsidiary of the issuer.

(4) Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(5) Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors.

(6) Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is

deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders.

(7) Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request or invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

(8) The provisions of this subsection shall not apply to any offer for, or request or invitation for tenders of, any security—

(A) if the acquisition of such security, together with all other acquisitions by the same person of securities of the same class during the preceding twelve months, would not exceed 2 per centum of that class;

(B) by the issuer of such security; or

(C) which the Commission, by rules or regulations or by order, shall exempt from the provisions of this subsection as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of this subsection.